

03/19/2019

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

JULIA C. DUDLEY, CLERK  
BY: *H. Wheeler*  
DEPUTY CLERK

No. 3:19CV00017

SOUTHERN ENVIRONMENTAL LAW )  
CENTER and DEFENDERS OF WILDLIFE, )

Plaintiffs, )

v. )

LEOPOLDO MIRANDA, in his official )  
capacity as Director of Region Four of the )  
United States Fish and Wildlife Service, )

JAMES KURTH, in his official capacity as )  
Deputy Director Exercising the Authority of the )  
Director of the United States Fish and Wildlife )  
Service, )

DANIEL JORJANI, in his official capacity as )  
Principal Deputy Solicitor Exercising the )  
Authority of Solicitor, the head of the Office of )  
the Solicitor, an agency within the Department )  
of the Interior, and )

DAVID BERNHARDT, in his official capacity )  
as Acting Secretary of the Department of the )  
Interior, )

Defendants. )

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This Freedom of Information Act ("FOIA") suit challenges the unlawful and unreasonable delay by Defendants Leopoldo Miranda, Director of Region Four of the United States Fish and Wildlife Service ("Region Four"), James Kurth, Acting Director of the United States Fish and Wildlife Service ("FWS" or "the Service"), Daniel Jorjani, Acting Solicitor for

the United States Department of the Interior, and David Bernhardt, Acting Secretary of the Department of the Interior, in responding to Plaintiffs' request for public records.

2. Plaintiffs Southern Environmental Law Center ("SELC"), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, and Defenders of Wildlife ("Defenders"), a nonprofit public interest organization working to protect and restore imperiled wildlife, submitted their request for records in the custody of Region Four on August 15, 2018.

3. Plaintiffs' request sought records of any quotas or targets adopted by Defendants since January 20, 2017 to limit or reduce the number of imperiled species protected under the Endangered Species Act in Region Four. Such policies and practices are influencing the direction, pace, and quality of decisions made by Region Four.

4. Prior to and during the pendency of Plaintiffs' request, Defendants adopted and implemented policies and practices requiring significant delays in the processing of FOIA requests. These policies and practices are unnecessary for Defendants to meet FOIA's requirements.

5. Although Region Four staff belatedly provided a limited quantity of the requested public records, the vast majority of responsive records continue to be delayed with no end in sight. The partial response, moreover, shows the existence and importance of the records that are still being withheld.

6. Defendants have violated FOIA by failing to provide requested records "promptly" and to make a determination within the time allotted under FOIA. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). Plaintiffs seek a declaration that Defendants have violated FOIA, an order requiring Defendants to provide all nonexempt, responsive documents without further

delay, and an injunction prohibiting Defendants from applying their new policies and practices in such a way that adds further unnecessary delay to the processing of Plaintiffs' FOIA request.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

8. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Plaintiffs are “deemed to have exhausted [their] administrative remedies” because Defendants have “fail[ed] to comply with the applicable time limit provisions.”

9. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). Plaintiff SELC is a 501(c)(3) nonprofit organization headquartered and residing in Charlottesville, Virginia, in the Western District of Virginia.

### **PARTIES**

#### **Plaintiffs**

10. Plaintiff Southern Environmental Law Center (“SELC”) is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern states.

11. SELC is a “person” for purposes of FOIA, 5 U.S.C. § 551(2).

12. SELC uses public advocacy and the law to protect the people and the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about activities affecting human health and the environment in the Southeast. SELC disseminates public information it gathers to the general public through its website, *southernenvironment.org*, which is updated regularly, as well as press releases, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings throughout the region, informed by and sharing their analysis of public information.

SELC has been actively engaged in protecting the environment of the Southeast at the federal, state, and local levels for three decades.

13. Plaintiff Defenders of Wildlife (“Defenders”) is a 501(c)(3), nonprofit public interest organization headquartered in Washington, D.C. that works to protect and restore imperiled wildlife, including in the Southeastern portion of the United States.

14. Defenders is a “person” for purposes of FOIA, 5 U.S.C. § 551(2).

15. Defenders is one of the nation’s leading advocates for endangered species and wildlife conservation. Defenders is a science-based conservation organization with more than 1.8 million members and supporters nationwide and around the world, including in the region within the scope of Region Four’s jurisdiction. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities. Defenders uses education, public outreach, science, policy, and litigation, along with legislative and administrative advocacy, to defend the species, ecosystems, and habitats that are central to the organization’s mission.

16. Plaintiffs submitted the FOIA request at issue in this case to promote transparency around matters of significant public interest.

17. Both SELC and Defenders regularly submit FOIA requests to Defendants as part of their missions and intend to continue doing so in the future.

### **Defendants**

18. Defendant Leopoldo Miranda is the Director of Region Four of the United States Fish and Wildlife Service, the region to which Plaintiffs’ FOIA request was directed.

19. The United States Fish and Wildlife Service (“FWS” or “the Service”) is an agency within the United States Department of the Interior. Defendant James Kurth, named in his official capacity as Deputy Director Exercising the Authority of the Director of FWS, has

assumed responsibility for the decisions of FWS under the color of law pursuant to the Department of the Interior's Secretarial Order 3345. Under Defendants' policies and practices, Plaintiffs' request and Region Four's response is subject to review by officials within FWS.

20. The Office of the Solicitor ("Solicitor's Office") is an office within the Department of the Interior. Defendant Daniel Jorjani, named in his official capacity as Principal Deputy Solicitor Exercising the Authority of Solicitor, has assumed responsibility for the decisions of the Office of the Solicitor under the color of law pursuant to the Department of the Interior's Secretarial Order 3345. Under Defendants' policies and practices, Plaintiffs' request and Region Four's response is subject to review by the Solicitor's Office.

21. David Bernhardt, named in his official capacity as Acting Secretary of the Department of the Interior ("the Department"), has ultimate responsibility for the decisions, policies, and practices of the Department and agencies within it, including FWS and the Solicitor's Office.

22. Defendants are "agencies" for purposes of FOIA. 5 U.S.C. § 551(1).

### **LEGAL BACKGROUND**

23. The Freedom of Information Act, 5 U.S.C. § 552, reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA "shines a light on government operations 'to check against corruption and to hold the governors accountable to the governed.'" *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

24. “[T]he time provisions of the Act are central to its purpose.” *Hayden v. U.S. Dep’t of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to “promptly” make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must notify requesters of the date on which a request is received, *id.* § 552(a)(7)(A), and provide a tracking number, *id.* § 552(a)(6)(B)(ii). Agencies, including FWS, must “determine . . . whether to comply” with a request within 20 working days of receiving the request, and they must “immediately notify” the requester of that determination. *Id.* § 552(a)(6)(A); *see also* 43 C.F.R. § 2.16(a) (Department FOIA regulations providing a 20 working day time limit for determinations).

25. To make a “determination” under FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

26. Agencies may extend their deadline for responding to a FOIA request, typically by up to 10 working days, if unusual circumstances apply and the agencies provide timely notice to the requester. 5 U.S.C. § 552(a)(6)(B); *see also* 43 C.F.R. § 2.19(a) (Department FOIA regulations providing for extensions when unusual circumstances apply).

27. FOIA provides that if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 5 U.S.C. § 552(a)(6)(B)(ii); 43 C.F.R. § 2.19(b)(1) (Department FOIA regulations regarding FOIA request modification and alternative time periods).

28. Records may be withheld under FOIA only pursuant to one of FOIA's narrowly defined exemptions. 5 U.S.C. § 552(b).

29. Exemption 5 to FOIA incorporates the so-called deliberative process privilege. 5 U.S.C. § 552(b)(5). Under this exemption, certain records can be withheld from a FOIA response if they are "deliberative" records generated as a part of the agency's decision-making process. However, deliberative documents cannot be categorically withheld. The FOIA Improvement Act of 2016, P.L. 114-185 (2016), was intended to codify a presumption of disclosure and to curb agencies' overuse of the deliberative process privilege. H.R. Rep. No. 114-391; S. Rep. No. 114-4. Records that qualify for an exemption under FOIA, including deliberative records, must be disclosed unless disclosure is prohibited by law or the agency reasonably foresees that disclosure of a particular record would harm an interest protected by the exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I); *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 76-79 (D.D.C. 2018).

## **STATEMENT OF FACTS**

### **Background**

30. A species' "listing status"—i.e., whether it is included on the lists of endangered and threatened species—determines whether it is entitled to the protections afforded by the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

31. The Service, through its Ecological Services Program, is responsible for maintaining the lists of endangered and threatened wildlife and plant species, determining whether species will be added to or removed from those lists, and periodically reassessing each species' status. *Id.* § 1533(c)(2)(A)-(B).

32. Region Four is currently reviewing the listing status of at least 77 species. See

FWS, 5-Year Status Reviews for 35 Southeastern Species, 83 Fed. Reg. 20092 (May 7, 2018) (providing public notification of status reviews for 35 species); FWS, 5-Year Status Reviews for 42 Southeastern Species, 83 Fed. Reg. 38320 (August 6, 2018) (providing public notification of status reviews for 42 species).

33. The direction, pace, and/or quality of Region Four's recent and pending decisions have been and are being affected by application of policies and practices to increase the number of negative listing decisions, including quotas, targets, requirements, expectations, and/or aspirations. Prior to Plaintiffs' request, the existence of such quotas or targets was not publicly known. This is a matter of significant public interest.

#### **Plaintiffs' FOIA Request**

34. On August 15, 2018, Plaintiffs submitted a FOIA request to Region Four seeking any and all records of changes to the region's policies or practices, or associated standards or criteria, for the listing, de-listing, or down-listing of species. Plaintiffs' request specifically sought any records of "quotas, targets, goals, requirements, expectations, or aspirations" for de-listing or down-listing species, as well certain other specifically described records, including instructions, review, or coordination provided by political appointees at the Department. Letter from Sam Evans, National Forests and Parks Program Leader, Southern Environmental Law Center, to Tiffany McClurkin, FOIA Coordinator, Region Four, U.S. Fish and Wildlife Service, U.S. Department of the Interior at 1 (dated Aug. 14, 2018) (attached hereto as Exhibit 1).

35. On August 22, 2018, Region Four staff, via email, confirmed receipt of this FOIA request, which was assigned tracking number FWS-2018-01131. In this email, Region Four staff also requested that Plaintiffs join a telephone conference to clarify items in the FOIA request and to assist Region Four in focusing its search.



36. On August 23, 2018, Plaintiffs participated in a telephone conference with Region Four staff during which they confirmed, among other things, that Region Four work plans were responsive to the request. Also during that call, Plaintiffs agreed to certain limiting clarifications to their request. The parties agreed to a “phased” approach, whereby Plaintiffs would exclude from their request emails related to Region Four work planning until after reviewing the work plans themselves.

37. Region Four staff agreed to memorialize the conversation for review by the call’s participants. Accordingly, on September 10, 2018, Region Four staff sent Plaintiffs a letter signed by Defendant Leopoldo Miranda, who was at that time the Acting Regional Director of Region Four. The letter purported to memorialize the parties’ August 23, 2018 telephone conversation. *See* Letter from Leopoldo Miranda, Assistant Regional Director, Region Four, U.S. Fish and Wildlife Service, U.S. Department of the Interior, to Sam Evans, Southern Environmental Law Center (Sept. 10, 2018) (attached hereto as Exhibit 2).

38. Defendants’ letter did not fully represent the parties’ conversation or agreements. Defendants’ letter contained limitations that Plaintiffs had not agreed to. Defendants’ letter also omitted categories of Plaintiffs’ request that the parties had not discussed or agreed to limit.

39. On September 24, 2018, Plaintiffs explained by letter which limitations they had agreed to and reiterated that they still sought the other records described in their request. *See* Letter from Sam Evans, National Forests and Parks Program Leader, Southern Environmental Law Center, to Larry Lee, Information Specialist, Region Four, U.S. Fish and Wildlife Service, U.S. Department of the Interior (Sept. 24, 2018) (attached hereto as Exhibit 3).

40. In their September 24, 2018 letter, Plaintiffs offered to extend the due date for Defendants’ response until October 15, 2018, based on the time needed to exchange letters

clarifying the request.

41. On October 18, 2018, Plaintiffs contacted Region Four by email explaining that the deadline had passed and seeking a firm completion date for the Service's response.

42. That same day, on October 18, 2018, Region Four staff stated that a partial response would be provided to Plaintiffs no later than October 26, 2018.

43. Plaintiffs did not receive any response, full or partial, by October 26, 2018. Instead, Region Four provided 42 responsive documents in a partial response on February 6, 2019, more than three months following its October 26, 2018 target date.

44. The partial response confirms the existence and relevance of other responsive records that have not been provided.

45. Documents included in Defendants' partial response reference a "wildly important goal" or "WIG" issued by Defendant Miranda to "[c]onserve 30 species by the end of Fiscal Year 2017 through preventing the need to list, downlisting, or delisting." Southeast Region Division of Environmental Review, FWS, *Thought Paper on Methods to Improve Division Activities in Support of Ecological Services' Wildly Important Goal* at 1 (Apr. 17, 2017) (attached hereto as Exhibit 4). The documents that were provided in Defendants' partial response do not include any original instructions or memoranda from Defendant Miranda setting out this "wildly important goal" for Region Four.

46. The objectives set out in the WIG to avoid listing, downlist, and/or delist species remain in effect.

47. Documents included in Defendants' partial response also show that each field office in Region Four has been required to commit to one or more of six "efficiency goals" that would shift resources in order to accomplish the WIG. *See Draft Message on WIG for FY17*

(July 7, 2017) (attached hereto as Exhibit 5). Documentation of the field offices' efficiency goals has not been provided.

48. Documents included in Defendants' partial response also show that the Regional office has provided guidance on "how to select species" for which FWS will take "actions that align with our WIG outcomes" and that "commitments [to make decisions about these selected species will] be clearly documented in workplans." *Id.* at 2. Defendants have not provided records of the guidance from the Regional office or the workplans themselves.

49. After Region Four provided the partial response, Plaintiffs inquired about the status of the remaining responsive documents. On February 14, 2019, Region Four staff informed Plaintiffs that the remainder of the responsive documents had been gathered and provided to the Program Office FOIA coordinator, but that disclosure of these records will be further delayed by several additional layers of review.

50. Plaintiffs have not been provided with any estimate of a date by when the response to their FOIA will be complete.

#### **New and Revised FOIA Policies and Practices that Add Unnecessary Delay**

51. Recently, Defendants have adopted and applied new policies and practices which add unnecessary delay to the processing of FOIA requests, including Plaintiffs' request.

52. Defendants' policies and practices contribute to delays not allowed by FOIA by (1) increasing the volume of deliberative records which are subject to additional review by the Solicitor's Office and (2) offering political appointees an opportunity to review records before they are disclosed.

##### **A. Increasing the Number of Deliberative Records Subject to Additional Review**

53. While Plaintiffs' request was pending, Defendants adopted a policy, intended to

remain confidential, concerning the “coordination” of FOIA responses with the preparation of Administrative Records for agency decisions challenged under the Administrative Procedure Act. This policy is expressed in a September 6, 2018 Memorandum to FWS staff and was provided to the press by a conservation organization that is not a party to this lawsuit. *See* U.S. Fish and Wildlife Service, U.S. Department of the Interior, *Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017 DOJ Memorandum on Administrative Record* (Sept. 6, 2018) (hereinafter “Deliberative Process Memorandum”) (attached hereto as Exhibit 6).

54. The goal of the policy described in Defendants’ Deliberative Process Memorandum is to identify for withholding any deliberative records containing substantive information and to develop a record to justify their withholding. The policy causes undue delay and precludes a good faith determination of whether records may be withheld under FOIA’s statutory standards.

55. The Deliberative Process Memorandum explains the Department of Justice’s categorical position that Administrative Records “should not include deliberative documents” and requires FOIA staff to “process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could subsequently be included in an [Administrative Record].” Deliberative Process Memorandum at 1.

56. The Department of Justice’s policy of categorically excluding deliberative records, which Defendants incorporate as the substantive goal of their FOIA policies and practices, is unlawful, because the application of deliberative process privilege must be justified on a document-by-document basis. *Defenders of Wildlife v. U.S. Department of Interior*, No. 18-2090, Doc. 70 (4th Cir. Feb. 5, 2019) (ordering FWS to produce a privilege log for any records

withheld as deliberative).

57. In order to “preserve the consistency of information released under FOIA” with the policy of categorically excluding deliberative records from Administrative Records, it is Defendants’ policy that any predecisional, deliberative records containing substantive information “should be considered for withholding.” Deliberative Process Memorandum at 1, 5-6.

58. The Deliberative Process Memorandum explains that Defendants’ new policy will result in the withholding of records that would commonly have been produced in the past—for example, directing FWS staff to withhold more records related to Endangered Species Act listing decisions, even though FWS’s prior practice was to “release[] most, if not all” of such records. Deliberative Process Memorandum at 2.

59. Pursuant to Defendants’ policy, the process for reviewing records where the deliberative process privilege may apply begins with a “thorough document review” by the relevant subject matter expert(s) and/or or FOIA staff. *Id.* at 5.

60. This first round of thorough document review is followed by a second review by the FWS FOIA Officer or Regional FOIA Coordinator. *Id.*

61. If based on these two reviews the FOIA Officer or Regional FOIA Coordinator determines that responsive deliberative documents should be disclosed because they would not cause foreseeable harm to an interest protected by one of FOIA’s exemptions, the responsible FOIA officer is nonetheless prohibited from disclosing them to the requester and (s)he must instead “seek additional information” from subject matter experts. Memo from Cindy Cafaro, Departmental FOIA Officer, U.S. Department of the Interior to Bureau/Office Freedom of Information Act (FOIA) Officers and FOIA Contacts, U.S. Department of the Interior at 2 (Dec,

22, 2017) (hereinafter, “Foreseeable Harm Standard,” which is incorporated by reference in the Deliberative Process Memorandum at 3) (attached hereto as Exhibit 7).

62. The Foreseeable Harm Memorandum suggests that this “additional information” may “change[] your decision” and result in withholding the record. Foreseeable Harm Memorandum at 3, Chart 1.

63. Taken together, the policies and practices described in the Deliberative Process and Foreseeable Harm Memoranda cause unnecessary delay in the disclosure of deliberative records.

64. Prior to the adoption of Defendants’ policies and practices, if the responsible FOIA Officer determined that disclosure of a deliberative record would not cause foreseeable harm to an interest protected by the deliberative process privilege, that record would have been provided to the requester.

65. After the adoption of these policies and practices, if the responsible FOIA Officer determines that disclosure would not cause foreseeable harm, that FOIA officer cannot release the record(s) but must instead seek additional facts that may support withholding (as explained in the Foreseeable Harm Memorandum) with the goal of withholding deliberative records containing substantive information consistent with the Department of Justice’s policy of excluding deliberative records from Administrative Records (as incorporated in the Deliberative Process Memorandum).

66. Records identified for withholding are not provided to the requester, but are instead forwarded to the Office of the Solicitor for further review. Deliberative Process Memorandum at 5 (*see also* 43 C.F.R. § 2.23(c)).

67. This policy inherently lends itself to delaying the amount of time necessary to

provide responsive records or a determination under FOIA.

68. First, the policy causes delay because staff are expected to conduct more searching reviews of records to identify content that can be withheld under the deliberative process privilege, with a second attempt to find facts to justify withholdings of records that previously would have been disclosed.

69. Second, because the reviews by subject matter experts, FOIA staff, FOIA Officers and Regional FOIA Coordinators are explicitly intended to increase the number of records that will be withheld, the policy increases the number of records that must be reviewed by the Solicitor's Office. Under this policy, all or nearly all deliberative records containing substantive information must go through a bottleneck of review in the Solicitor's Office.

70. Review of voluminous deliberative records by the Solicitor's Office is inherently inefficient and necessarily contributes to delays in the processing of FOIA requests.

### **B. Review By Political Appointees**

71. Defendant has also adopted a binding policy providing for review by political appointees of FOIA responses. This policy is described in the Awareness Process Memorandum, issued on May 24, 2018. *See* Memorandum from Cindy Cafaro, Departmental FOIA Officer, U.S. Department of the Interior to Assistant Secretaries, Heads of Bureaus and Offices, and Bureau/Office FOIA Officers (May 24, 2018) (attached hereto as Exhibit 8).

72. Pursuant to this policy, all responsive emails and attachments must be searched for the names and email addresses of all Presidentially Appointed, Senate Confirmed, Non-Career Senior Executive Service, and/or Schedule C employees (collectively, "political appointees") within the Department of the Interior. *Id.* at 1-2.

73. Although it is unclear how many political appointee positions have been filled at

the Department, this review would require searching for the names and email addresses of dozens of political appointees. There are more than 70 vacant and occupied politically appointed positions in the Department.

74. If any of these records contain the names or email addresses of any political appointee(s), the “full set of responsive records” must be provided to the political appointee(s), and the Office of the Solicitor must be notified “simultaneously.” *Id.* at 2. The political appointee(s) and the Office of the Solicitor must be given at least 72 hours to review the records, and reviewers may request an indefinite amount of additional time beyond that 72 hours. *Id.*

75. Pursuant to the Awareness Process Memorandum, FOIA personnel cannot provide records to a FOIA requester until after the review period for any applicable political appointees and the Solicitor’s Office has ended. *Id.*

76. The Awareness Process Memorandum does not explain what role or expertise political appointees have in the fulfillment of the Department’s statutory obligations under FOIA; the sole purpose offered is “to facilitate awareness of the information that will be released.” *Id.* at 2 n.9.

77. The Awareness Process Memorandum notes that political appointee reviewers may “follow up” as needed to “understand” a decision whether to disclose records. *Id.* The policy described in the Awareness Process Memorandum therefore makes political appointees aware of a decision to disclose politically sensitive documents pursuant to FOIA, and simultaneously connects the concerned political appointee with an attorney in the Solicitor’s Office who, under a related policy, can unilaterally override the decision to disclose the records. *See* Secretarial Order 3371 (Nov. 20, 2018) (attached hereto as Exhibit 9) (consolidating authority over FOIA requests and responses in the Solicitor’s Office).



78. This policy necessarily increases the duration of the FOIA response review process for applicable records. First, FOIA staff must take the time to search responsive records for the names of dozens of political appointees at the Department. Second, political appointees are afforded at least three days to review records, and they are allowed to request an indefinite amount of additional review time during which they may question the basis of the disclosures.

### **C. Defendants' Policies and Practices Cause Unnecessary Delay**

79. The response to Plaintiffs' request, already unlawfully delayed, is subject to Defendants' policies and practices, which will contribute to further unlawful delay by increasing the number of records subject to additional review and requiring review by political appointees.

80. Many records responsive to Plaintiffs' request are subject to Defendants' policies and practices described in the Deliberative Process and Foreseeable Harm Memoranda.

81. Any delays in the disclosure of records attributable to the policies and practices described in the Deliberative Process and Foreseeable Harm Memoranda are unnecessary because they are intended to further an unlawful purpose—namely, ensuring that deliberative records containing substantive information are not disclosed under FOIA because they would not be included in a subsequent Administrative Record under the Department of Justice's policy of categorically excluding deliberative records.

82. Records responsive to Plaintiffs' request also include records of political appointee involvement in policy-making and decision-making. As a result, all records responsive to Plaintiffs' request are subject to the review process described in the Awareness Process Memorandum.

83. Any delays in the disclosure of records attributable to the policies and practices described in the Awareness Process Memorandum are unnecessary. A policy could instead achieve the same goal of "awareness" without delaying disclosure until after the records have

been reviewed by political appointees.

84. Defendants are already in violation of FOIA's mandatory timeframes for responding to Plaintiffs' request, and the application of Defendants' unnecessary and unlawful policies to Plaintiffs' request is causing or will cause further delay.

85. Notwithstanding the diligence, dedication, and professionalism of FOIA and program staff within the agencies with custody over requested records, Defendants' policies and practices create a cumbersome, unnecessary, and unlawful framework that runs counter to providing timely responses to FOIA requests, including to Plaintiffs' request.

### **CLAIMS FOR RELIEF**

#### **Count 1**

86. Plaintiffs incorporate by reference paragraphs 1 through 85 of this Complaint as if fully stated herein.

87. Defendants are in violation of FOIA and the Department of the Interior's implementing regulations by failing to "promptly" provide responsive records and by failing to provide SELC and Defenders with a determination of which records will be disclosed and which will be withheld within the mandatory time limits established by FOIA and its implementing regulations. *See* 5 U.S.C. § 552(a)(6)(A), (a)(6)(B); 43 C.F.R. §§ 2.16(a), 2.19(a).

88. By failing to provide Plaintiffs with all non-exempt responsive records to this request, Defendants have denied Plaintiffs' right to this information, as provided by law under FOIA.

89. Defendants' failure to timely respond to Plaintiffs' request has frustrated Plaintiffs' ability to submit follow-up requests for Defendants' emails related to work planning,

because Plaintiffs agreed to defer this portion of their request until after the workplans were produced as a part of this overdue FOIA response.

90. Unless enjoined by this Court to produce non-exempt, responsive records, including the emails related to work planning, Defendants will continue to violate Plaintiffs' legal right to be provided with the records to which they are entitled under FOIA.

91. Plaintiffs are directly and adversely affected and aggrieved by Defendants' failure to provide responsive records to their FOIA request as described above.

## **Count 2**

92. Plaintiffs incorporate by reference paragraphs 1 through 85 of this Complaint as if fully stated herein.

93. The policies and practices described in the Deliberative Process Memorandum and the Foreseeable Harm Memorandum create delay in disclosing records by (1) forbidding the disclosure of records determined to be disclosable and instead requiring staff to seek additional facts to justify withholding and (2) increasing the number of records subject to review by the Solicitor's Office.

94. The policies and practices described in this memorandum are unnecessary for Defendants to meet their obligations under FOIA and, indeed, serve a purpose directly contrary to Defendants' obligations under FOIA.

95. The policies and practices outlined in the Awareness Process Memorandum create delay in disclosing records by (1) requiring FOIA staff to search all FOIA responses for the names and email addresses of dozens of political appointees, (2) granting any appointees whose names have been identified in responsive documents at least three days to review the contents of

the entire FOIA response, and (3) allowing the applicable political appointees to request an indefinite amount of additional review time.

96. The policies and practices outlined in the Awareness Process Memorandum are unnecessary for Defendants to meet their obligations under FOIA and, indeed, serve a purpose directly contrary to Defendants' obligations under FOIA. There is no plausible lawful purpose for withholding records the agency has already determined must be disclosed while they are being reviewed by political appointees.

97. The response to Plaintiffs' request has already been delayed beyond the limits imposed by statute, and Defendants' unnecessary and unlawful policies and practices are causing or will cause further delay.

98. Plaintiffs will continue to be harmed by Defendants' unlawful delay in providing information to which Plaintiffs are entitled if Defendants are not enjoined from applying the policies and practices described in the Deliberative Process Memorandum, Foreseeable Harm Memorandum, and the Awareness Process Memorandum to add further delay to the processing of Plaintiffs' request.

99. Plaintiffs are directly and adversely affected and aggrieved by Defendants' policies and practices, which frustrate their right to receive a timely response to their request as described above.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- (i) Declare that Defendants have violated and are continuing to violate FOIA by failing to timely provide a determination under FOIA for the records that are still being withheld;

- (ii) Declare that Defendants have violated and are continuing to violate FOIA by improperly withholding documents that are responsive to Plaintiffs' request;
- (iii) Declare that the policies and practices described in the Deliberative Process Memorandum, the Foreseeable Harm Memorandum, and the Awareness Process Memorandum are unlawful to the extent that they add further delay to Defendants' response, which has already exceeded the statutory time limits;
- (iv) Enjoin Defendants from applying the policies and practices described in the Deliberative Process Memorandum to add further delay to requests, like Plaintiffs' request, which have already exceeded the statutory time limits;
- (v) Enjoin Defendants from applying the policies and practices described in the Awareness Process Memorandum to add further delay to requests, like Plaintiffs' request, which have already exceeded the statutory time limits;
- (vi) Direct Defendants to provide all nonexempt, responsive documents to Plaintiffs without further delay;
- (vii) Retain jurisdiction over this matter to rule on any assertions by Defendants that any responsive documents cannot be found or are exempt from disclosure;
- (viii) Order Defendants to produce an index identifying any documents or parts thereof that they withhold and the basis for the withholdings pursuant to 5 U.S.C. §§ 552(a)(8) and 552(b), in the event that Defendants determine that any responsive records are exempt from disclosure;
- (ix) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (x) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 19th day of March 2018.

/s/ Morgan Butler

Morgan Butler – VA Bar No. 70409

/s/ Kimberley Hunter

Kimberley Hunter – NC Bar No. 41333 (application for admission *pro hac vice* pending)

/s/ Sam Evans

Sam Evans – NC Bar No. 44992 (application for admission *pro hac vice* pending)

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